

)	
R.G., Appellant)	
)	
and)	Docket No. 15-0492
)	Issued: November 16, 2015
U.S. POSTAL SERVICE, BELLEVILLE)	
BRANCH, Jersey City, NJ, Employer)	
)	

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 5, 2015 appellant, through counsel, filed a timely appeal from a September 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits on December 31, 2013 pursuant to 5 U.S.C. § 8106(c).

On appeal appellant, though counsel, contends that she was denied due process in that she did not receive proper notice prior to the termination of her benefits. In the alternative, counsel contends that there was a conflict in medical evidence and that therefore she should have been sent for an impartial medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 6, 2012 appellant, then a 56-year-old sales and service associate, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2012 she injured her right arm and sustained shoulder pain while moving a parcel on a table. OWCP accepted her claim for right shoulder impingement syndrome.

On December 13, 2012 Dr. Robert Kayal, a Board-certified orthopedic surgeon, performed a right shoulder arthroscopy. In progress reports dated from February 27 through May 22, 2013, he excused appellant from all work until further notice due to medical reasons.

On April 22, 2013 OWCP referred appellant to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion as to whether she continued to have residuals of the accepted injury and remained disabled. In a May 6, 2013 report, Dr. Lakin listed the accepted diagnosis of impingement syndrome for which she had undergone surgical intervention on December 13, 2012. He noted that appellant continued to have objective signs and symptoms of the accepted condition of shoulder impingement, noting decreased strength and decreased motion of the right shoulder, which were related to the surgery of December 13, 2012. Dr. Lakin noted that she was unable to perform her date-of-injury job as she was unable to reach overhead with the right shoulder and had decreased strength of the right shoulder. He further opined that pushing/pulling/lifting/squatting/kneeling/climbing should be limited to one hour and 10 pounds. However, Dr. Lakin opined that appellant was capable of returning to work full time on light duty with limitations as noted in an OWCP-5 form.

In a June 24, 2013 report, Dr. Kayal noted that June 5, 2013 magnetic resonance imaging (MRI) scans showed a focal interstitial tear within the distal posterior supraspinatus tendon; tear of the posterior inferior labrum; evidence of a probable prior superior labral tear from anterior to posterior (SLAP) with no evidence of recurrent superior labral tear; mild osteoarthritis at the glenohumeral joint; small intraarticular loose body within the axillary recess; and mild-to-moderate subacromial/subdeltoid bursitis. He diagnosed neck sprain on right side, sprained right superior glenoid labrum lesion, shoulder tendinitis, and adhesive capsulitis of the shoulder.

On July 1, 2013 the employing establishment offered a modified assignment, services/distribution associate -- modified. The position was limited to intermittent lifting/pushing/pulling up to 10 pounds intermittently for one hour a day, and standing and intermittent reaching (not above shoulder) for eight hours a day. On July 17, 2013 appellant declined the position.

By letter dated July 12, 2013, OWCP informed appellant that the weight of the evidence rested with Dr. Lakin because Dr. Kayal had not provided medical rationale as to why she remained totally disabled.

In a July 25, 2013 note, Dr. Kayal indicated that appellant could return to light duty. He did not recommend any lifting, pushing, pulling, or reaching.

On August 13, 2013 the employing establishment again offered appellant a modified position as a sales, service/distribution associate. The position involved intermittent lifting up to

10 pounds for one hour, intermittent pushing/pulling up to 10 pounds for one hour, and eight hours of standing and intermittent reaching (not above shoulder).

By letter dated August 14, 2013, OWCP advised appellant that it had reviewed the job offer by the employing establishment and found it to be within the restrictions set by Dr. Lakin. It noted that Dr. Kayal had not provided a rationalized statement as to why she could not lift, push, pull, or reach nor did he indicate how many hours a day she could work. Appellant was given 30 days to respond. OWCP informed her that if she failed to report to the offered position or her reason for not reporting was not justified, her right to compensation and schedule award benefits would be terminated. Appellant accepted the modified assignment with the employing establishment on September 11, 2013.

In a September 16, 2013 report, Dr. Kayal noted that appellant had been injured at work on March 2, 2012 when she suffered an injury to her right shoulder. He noted that her injury required right shoulder arthroscopy which included a glenohumeral (GH) joint synovectomy, labral stabilization of a SLAP lesion, chondroplasty of the GH joint, subacromial decompression with bursectomy, debridement of a partial thickness bursal-sided rotator cuff tear, and rotator cuff repair. Dr. Kayal noted that it had now been nine months since appellant's right shoulder arthroscopy and her range of motion remained poor. He noted severe limitations in her right shoulder motion due to pain. Dr. Kayal noted that he would even consider appellant's shoulder to be "frozen" and consistent with the syndrome of adhesive capsulitis. He noted that physical therapy was still imperative.

Appellant retired as of October 1, 2013.

By letter dated November 19, 2013, OWCP noted that appellant had returned to work as a modified sales service/distribution associate on September 11, 2013, but elected to retire on October 1, 2013. It determined that the weight of the medical evidence rested with Dr. Lakin and that the evidence of record established that she could perform the suitable modified offer. OWCP advised appellant that she had 30 days to accept the position or provide reasons for not returning to her position.

In response, appellant submitted a November 6, 2013 progress note wherein Dr. Kayal noted that he gave her an injection. Dr. Kayal noted that she should continue to work at managing what has become a frozen shoulder. He continued to assess appellant with neck sprain on the right side, sprained right superior glenoid labrum lesion, shoulder tendinitis, and adhesive capsulitis of the shoulder.

By letter dated December 31, 2013, OWCP terminated appellant's compensation for wage-loss and schedule award benefits effective that date for abandonment of suitable work in accordance with 5 U.S.C. § 8106(c)(2).

By letter dated January 7, 2014 appellant, through counsel, requested a hearing before an OWCP hearing representative. At the hearing held on June 19, 2014, appellant's counsel argued that appellant was denied procedural due process in that she was entitled to another letter providing her 15 days to report to work after being told that her reasons for not accepting the

position were invalid. He also suggested that the medical evidence was insufficient to show that the job was suitable.

In a letter dated July 23, 2014, appellant stated that she had returned to work on September 11, 2013, that one of the clerks told her that she should not have come back to work as there was no light-duty work on window, that her supervisor showed her a way to lift heavy boxes, that she was in pain every day of work, and that she told her supervisor that it was too much for her and retired on September 30, 2013.

By decision dated September 5, 2014, an OWCP hearing representative affirmed the December 31, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² Section 8106(c)(2) of FECA provides that a partially disabled employee who refused or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.³ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁴

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁵ Pursuant to section 10.516, the employee shall be provided the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁶

Before compensation can be terminated, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.⁷ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.⁸

² *Linda D. Guerrero*, 54 ECAB 556 (2003).

³ *Supra* note 1 at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁴ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁵ 20 C.F.R. § 10.517(a); *see also id.*

⁶ *Id.* at § 10.516.

⁷ *See Linda Hilton*, 52 ECAB 476 (2001).

⁸ *Id.*

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.⁹ If the employee presents evidence or reasons for refusing the offered position and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.¹⁰ After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further compensation.¹¹ However, the employee may remain eligible for medical benefits.¹²

ANALYSIS

The Board finds that OWCP improperly terminated appellant's compensation benefits. As a penalty provision, 5 U.S.C. § 8106(c) should be narrowly construed and not lightly invoked.¹³ The regulatory scheme for imposing the penalty of termination of benefits by OWCP provides for a two-tiered notification process.¹⁴ The initial 30-day notification was issued on August 14, 2013 when OWCP determined that the position of a modified sales service/distribution association was suitable. Appellant did accept this job offer on September 11, 2013 and returned to work, but she elected to retire as of October 1, 2013.

OWCP then advised appellant on November 19, 2013 that she had 30 days to either accept the position or present, in writing, any reasons to counter its finding of suitability.¹⁵ In response, appellant submitted further medical evidence, specifically a progress note by Dr. Kayal dated November 6, 2013. OWCP terminated her benefits on December 31, 2013 without issuing a 15-day letter giving appellant the opportunity to accept the offered position without penalty.

Initially, the Board rejects counsel's argument that the 15-day letter should have been issued because appellant was retired and that OWCP stated in the December 31, 2013 decision that retirement was not a valid reason for refusing to accept the job. Counsel argues that the present case is similar to *J.S.*,¹⁶ wherein the claimant indicated his desire to retire, and the Board found that OWCP had failed to provide appellant 15 days to return to work before terminating compensation. Counsel's argument is flawed as the date sequence presented in argument is incorrect and therefore is distinguished from *J.S.* In *J.S.*, the claimant explained, in response to the 30-day letter, that he was retiring. Therefore, OWCP failed to issue a 15-day letter providing

⁹ 20 C.F.R. § 10.516.

¹⁰ *Id.* See also *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992). The 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable.

¹¹ *Stephen A. Basquale*, 57 ECAB 396, 402 (2006); see also *N.B.*, Docket No. 14-1778 (issued July 27, 2015).

¹² *Supra* note 5 § 10.517(b).

¹³ *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

¹⁴ 20 C.F.R. §§ 10.516, 10.517(b); see *S.G.*, Docket No. 08-1992 (issued September 22, 2009).

¹⁵ *Id.* at § 10.516.

¹⁶ Docket No. 06-1931 (issued April 11, 2007).

appellant the additional opportunity to accept the position. The Board found that she should have been provided with the 15-day letter and that therefore OWCP improperly terminated compensation. In the instant case, appellant retired before the 30-day letter was issued. Specifically, in the instant case, she retired as of October 1, 2013 and after the retirement, OWCP sent a November 19, 2013 letter advising her that she had 30 days to accept the offered position or provide reasons for not returning to that position. Accordingly, the Board finds that the requirement of a 15-day notice was not initiated by appellant's retirement.

However, the Board finds that OWCP's termination of benefits was still procedurally flawed. Appellant submitted additional medical evidence in response to OWCP's November 19, 2013 letter, specifically, the November 6, 2013 progress note by Dr. Kayal. OWCP acknowledged receiving this evidence, but did not provide her a 15-day notification prior to terminating her compensation.¹⁷ Pursuant to OWCP's procedure manual, OWCP should have provided appellant an additional 15-day notice after rejection of the new evidence giving her the opportunity to accept the position prior to terminating her compensation.¹⁸ Accordingly, due to a procedural error, OWCP did not properly terminate appellant's compensation on the grounds that she abandoned suitable employment under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not properly terminate appellant's compensation benefits on December 31, 2013 pursuant to 5 U.S.C. § 8106(c).

¹⁷ *Supra* note 7; see also *Sergio Sepulveda*, Docket No. 04-2111 (issued November 24, 2004).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings, Determining Whether Earnings are Representative of the Wage-Earning Capacity, Job Offer Refusal*, Chapter 2.814.5(e)(3) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2014 is reversed.¹⁹

Issued: November 16, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.